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Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

CHARLES C. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *United States v. Almendarez-Torres*, 523 U.S. 224 (1998) was wrongly decided in that the Fifth and Sixth Amendments require proof beyond a reasonable doubt and a jury determination of prior convictions which implicate a mandatory life sentence and therefore the recidivism element of 21 U.S.C. § 841(b)(1)(A) is an element of the offense which implicates those constitutional protections.
2. Whether an ambiguity exists in the penalties provisions of 21 U.S.C. § 841 *et seq.* requiring the application of the rule lenity, because the words "cocaine base" and "cocaine" have the same chemical meaning and therefore, a verdict of possession with the intent to deliver more than 50 grams of "cocaine base" can implicate two separate penalty provisions upon the finding of two prior convictions, either a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A)(iii), or more lenient sentence under 21 U.S.C. § 841(b)(1)(C)?

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Charles C. Brown respectfully petitions this Honorable Court for the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit. Mr. Brown relies upon the facts and arguments outlined below.

OPINIONS BELOW

The United States Court of Appeals for the First Circuit affirmed Mr. Brown's conviction and sentence on November 16, 2005 in *United States v. Isler*, 429 F.3d 19 (1st Cir. 2005). A copy of the published opinion is attached in the Appendix following the text of the petition.

JURISDICTION

The District Court had jurisdiction over the case pursuant to 18 U.S.C. § 3231, which vests in the United States District Courts jurisdiction over offenses against the laws of the United States.

The First Circuit had jurisdiction over the defendant's appeal pursuant to 28 U.S.C. § 1291, which vests in the United States Courts of Appeals jurisdiction of appeals from all final decisions of the District Court, and 18 U.S.C. § 3742, which authorizes the appeal of otherwise final sentences if it is alleged the sentence was imposed in violation of law or as a result of an incorrect application of the sentencing guidelines.

The Supreme Court has jurisdiction over certiorari petitions, to review the judgment of a United States Court

of Appeals, filed within ninety (90) days of the Judgment date. Supreme Court Rule 13, 28 U.S.C. § 1254.

Mr. Brown filed his Notice of Appeal in the District Court on May 20, 2004. The District Court's judgment of conviction entered on May 21, 2004. The First Circuit affirmed Mr. Brown's conviction and sentence on November 16, 2005. Neither party sought rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 841 *et seq.* See Appendix.

21 U.S.C. § 851 *et seq.* See Appendix.

STATEMENT OF THE CASE

An indictment was returned on August 6, 2003 charging Charles C. Brown with Count One, conspiracy to distribute and possess with the intent to distribute more than 50 grams of a substance containing cocaine base, a Schedule II Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 21 U.S.C. § 846; Count Two, possession with intent to distribute more than 50 grams of a substance containing cocaine base, a Schedule II Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2; and Count Three, possession with intent to distribute more than 5 grams of a substance containing cocaine base, a Schedule II Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).

A jury trial commenced on January 26, 2004. The jury heard testimony and arguments for six days and returned a verdict of guilty on all counts charged against Mr. Brown. On May 20, 2004 the trial court found Brown had two prior drug offense convictions and sentenced him to a mandatory term of life imprisonment without release pursuant to 21 U.S.C. §§ 841(b)(1)(A)(iii). Brown objected to the court's determination that his convictions were unrelated and asserted they should count as only one prior

conviction. The trial court stated that if she had discretion she would not have imposed a life sentence. Mr. Brown appealed his conviction and sentence to the United States Court of Appeals for the First Circuit. He asserted a Sixth Amendment violation based on a judicial determination of his prior convictions and the resulting life sentence. Brown asserted *United States v. Almendarez-Torres*, 523 U.S. 224 (1998) was wrongly decided. Brown also asserted that 21 U.S.C. § 841 is ambiguous in that it allows for two separate sentencing provisions for a single conviction. The First Circuit affirmed Mr. Brown's conviction and sentence on November 16, 2005.

REASONS FOR GRANTING THE WRIT

1. *Almendarez-Torres* was wrongly decided and should be revisited by the Court and should not be applied to 21 U.S.C. § 841 *et seq.*

Brown asserts that *Almendarez-Torres* was wrongly decided and should be revisited by the Court. Taken together, the Due Process Clause of the Fifth Amendment and the trial protections guaranteed by the Sixth Amendment require a jury determination of prior convictions, which implicate a mandatory life sentence.

In the alternative, Brown argues that his case stands distinguished from the unique fact of *Almendarez-Torres* and its holding should not be applied to 21 U.S.C. § 841 *et seq.*

Almendarez-Torres held that the Due Process Clause did not require the fact of a prior conviction to be treated as an element of 8 U.S.C. § 1326. *Almendarez-Torres* did not address prior convictions within to 21 U.S.C. § 841 *et*

seq. Notably, the *Apprendi v. New Jersey*, 530 U.S. 466, 488-489 (2000) majority suggested that *Almendarez-Torres* is limited to its "unique facts," including the defendant's failure to contest the accuracy of the fact of his prior convictions. *Apprendi v. New Jersey*, 530 U.S. 466, 488-489 (2000); accord, *United States v. Cordoza-Estrada*, 385 F.3d 56, 59-60 (1st Cir. 2004). In contrast, Brown squarely contested the accuracy of the fact that his prior convictions were related and 21 U.S.C. § 851(e) prevented him from contesting the constitutional validity of his convictions. *Almendarez-Torres* held that the prior conviction section of the statute, 8 U.S.C. § 1326, was a penalty provision which did not define a separate crime and there was no requirement for the prior conviction to be stated in the indictment. In making this determination and interpreting Congress' intent the Court, in part, considered the magnitude of the increase in sentence and determined the change from a 2 year maximum to a potential 20 year maximum was an accepted range. However, Justice Breyer, writing for the majority in *Almendarez-Torres*, tempered the authority of Congress and reserved power in the court to intervene again by declaring that the congressional authority to define which factors are sentencing factors and which factors are elements of a crime *has limits*. *Almendarez-Torres* at 228. In 21 U.S.C. § 841(b)(1)(A) Congress stepped outside of the "limits" by allowing a life sentence to be conditioned solely on a judicial determination of prior convictions.

The Supreme Court has noted that the number of years by which a sentence may increase *does* impact its decision when interpreting whether or not a statutory provision is an "element" of the substantive offense demanding proof beyond a reasonable doubt before a jury or